ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF GEORGIA.[2]

SUPREME COURT OF OHIO.[3]

COURT OF ERRORS AND APPEALS OF MARYLAND.[4]

SUPREME JUDICIAL COURT OF MASSACHUSETTS.[5]

SUPREME COURT OF MISSOURI.[6]

ABATEMENT.

Death of Defendant after Appeal.—Where in an action for malicious prosecution, the plaintiff appeals from a judgment in favor of the defendant, and after the appeal taken the defendant dies, the suit will abate: *Clark* v. *Carroll*, 59 Md.

ACCOUNT.

Profits of Illegal Investment of Trust Moneys.—If two executors have united in misusing funds in their hands, in the purchase of land for their own benefit, and profits have arisen from such purchase, which are held by one of them, or the title to the land stands in the name of one of them, and it does not appear that the persons interested in the estate are debarred by acquiescence or otherwise from their right to avail themselves of the advantage of the purchase, the other executor cannot maintain a bill in equity for an account and for the payment to him of a proportionate share of the profits; *Bowen* v. *Richardson*, 133 Mass.

AGENT.

Sale to Agent—Subsequent Action against Principal.—If a vendor, with full knowledge that the sale was made to a husband as agent for his wife and for her benefit, elected to give exclusive credit to the husband as agent, he could not afterwards recover from the wife as principal; but if the vendor was ignorant of the fact that he was dealing with the agent of another, and that the latter received the goods and used them, and they were really bought for the principal, though unknown to the seller when sold, such vendor may recover from the principal when this fact comes to his knowledge, though credit was given to the agent: *Miller* v. *Watt*, 65 or 66 Ga.

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1882. The cases will probably appear in 107 Otto.

[2] From J. H. Lumpkin, Esq., Reporter. The cases will probably appear in 65 or 66 Georgia Reports.

[3] From E. L. De Witt, Esq., Reporter. The cases will probably appear in 38 or 39 Ohio St. Reports.

[4] From J. Shaaf Stockett, Esq., Reporter; to appear in 59 Md. Reports.

[5] From John Lathrop, Esq., Reporter; to appear in 133 Mass. Reports.

[6] From T. K. Skinker, Esq., Reporter; to appear in 76 Mo. Reports.

Attachment.

Claim of Property seized under Attachment—Right of Claimant to Damages under the Issue of Property vel non—Appraisement—Effect of Bond being in a less Amount than required by the Law.—The Act of 1876, ch. 285, prescribed a mode in which the claimant of personal property, goods or chattels taken under attachment or execution, might, by filing a petition and giving bond, procure a discharge of the property. *Held*, 1st. That upon the trial of the issue joined upon such claim of property, the question of damages, as well as the right of property, is to be settled. 2d. That to entitle the claimant to recover damages it is not necessary that his petition should in terms claim them. 3d. That the requirement by said Act, of a bond to be given by the claimant, in "double the appraised value of the property attached or seized," necessitates an appraisement, whenever a claim of property shall be set up. 4th. That taking the bond in less than the amount prescribed, neither works a total defeat of the claimant's right to recover, nor prevents an inquiry of damages: *Turner* v. *Lytle*, 59 Md.

Whether the claimant is compelled, if he knows of the levy and seizure, to resort to this method of asserting his rights, in order to secure the property, and recover damages, *quære? Id.*

Bills and Notes.

Negotiable Instrument.—A promissory note, payable "on demand or in three years from this date," with interest at a certain rate "during said term or for such further time as said principal sum or any part thereof shall remain unpaid," is not negotiable: *Mahoney* v. *Fitzpatrick*, 133 Mass.

Charity.

When Gift for will be upheld.—William Russell, "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri," granted lands and personal property to Horner and his successors in trust "for the use and benefit of the Russell Institute of St. Louis, Missouri," with directions to sell, and to account for and pay over the proceeds "to Thomas Allen, President of the Board of Trustees of the said Russell Institute at St. Louis, Missouri," whose receipt should be a full discharge to the grantee. *Held*, that this was a charitable gift, valid against the donor's heirs and next of kin, although the institution was neither established nor incorporated in the lifetime of the donor or of Allen: *Russell* v. *Allen*, S. C. U. S., Oct. Term 1882. See also, *Jones* v. *Habersham*, same court and term.

Conflict of Laws. See *Corporation.*

Constitutional Law. See *Will.*

Eminent Domain—Laches of Landowner—Injunction.—While the Constitution of 1877 provides that private property shall not be taken or damaged for public use unless just and adequate compensation be first paid, yet where a landowner permitted a railroad company to lay out and construct its road through his land and appropriate timber thereon, without any objection until the entire road had been completed

and equipped at large expense, his property forming but a small fraction thereof, he could not then enjoin the use of the entire road until his damages should be assessed and settled. One cannot stand by and suffer another to expend large amounts of money on his land as a part of a great system of improvement, and then stop by injunction the entire system until he is paid: *Griffin* v. *Augusta and Knoxville Railroad Co.*, 65 or 66 Geo.

Tax on Insurance Companies.—The statute of 1880, c. 227, imposing upon every corporation and association engaged within the Commonwealth in the business of life insurance an annual excise tax, "to be determined by assessment of the same upon a valuation equal to the aggregate net value of all policies in force on the 31st day of December then next preceding, issued or assumed by such corporation or association, and held by residents of the Commonwealth, at the rate of one-half of one per cent. per annum," is constitutional: *Conn. Mutual Life Ins. Co.* v. *Commonwealth*, 133 Mass.

Ex post facto Law, what is—Point of Time to be considered.—The plaintiff in error stood convicted of murder in the first degree by the judgment of the Supreme Court of the state of Missouri. He had been previously sentenced to twenty-five years' imprisonment on his plea of guilty of murder in the second degree, which sentence was, on his appeal, reversed and set aside. By the law of Missouri in force when the homicide was committed, this conviction was an acquittal of the higher crime of murder in the first degree, but that law was changed before the plea of guilty, so that a judgment on that plea, set aside lawfully, should not be held to be an acquittal of the higher crime: *Held*, that as to this case the new law was an *ex post facto* law, within the meaning of sect. 10, art. 1, of the Constitution of the United States, and that plaintiff in error could not be again tried for murder in the first degree: *King* v. *The State of Missouri*, S. C. U. S., Oct. Term 1882.

The distinction between retrospective laws, which affect the remedy or the mode of procedure, and those which operate directly on the offence, held to be unsound where, in the latter case, they affect to his serious disadvantage any substantial right which the party charged with crime had under the law as it stood when the offence was committed: *Id.*

Any law is an *ex post facto* law, within the meaning of the Constitution, which is passed after the commission of a crime charged against a defendant, and which, in relation to that offence or its consequences, alters the situation of the party to his disadvantage; and no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time: *Id.*

CONTRACT. See *Interest.*

CORPORATION.

Sale of Shares of Stock as full paid Shares—Bona Fide Purchasers—Property in Payment of Capital Stock—Rights of Creditors.—Where shares of the capital stock are issued by a corporation to the original

subscribers as full paid shares, and are sold by them as such, a purchaser thereof in good faith cannot be held liable to a creditor of the corporation in the value of his stock as for unpaid instalments: *Brant* v. *Ehlen*, 59 Md.

The unpaid subscriptions of an insolvent corporation, in the hands of a *bona fide* purchaser without notice, do not constitute a trust fund which may be pursued by the creditors of the corporation, and subjected to the payment of their claims: *Id.*

A corporation may receive in payment of shares of its capital stock any property which it may lawfully purchase, and so long as the transaction stands unimpeached for fraud, courts will treat as a payment that which the parties themselves have so regarded, and this, too, in cases where the rights of creditors are involved: *Id.*

Liability for Debts of Corporation of one holding Stock as Collateral Security—Conflict of Law between United States Courts and those of the State.—By a statute of Missouri, stockholders of a corporation at its dissolution are liable for its debts; but it is provided that no person holding stock as collateral security shall be so liable, but the persons pledging such stock shall be considered as holding the same and liable: *Held*, 1. That persons to whom stock of a corporation is pledged as collateral security by the corporation itself are within the exemption of the statute; 2. That certificates of the stock absolute on their face, issued to a creditor as collateral security, or in trust, may be shown to be so held by evidence *in pais*; 3. That the holder of such stock as collateral security, or in trust, though he vote on such stock, is not thereby estopped from showing that the stock belongs to the company and not to him, and that he only holds it as collateral security: *Burgess* v. *Seligman*, S. C. U. S., Oct. Term 1882.

The Supreme Court of Missouri, after the transaction arose, and after the circuit court had decided this case, made a contrary decision against the same stockholders, at the suit of another plaintiff, holding that the clause of exemption in the statute does not extend to persons receiving stock as collateral security from the corporation itself; and this decision being urged as conclusive upon the federal courts: *Held*, that this court is not bound to follow the decision of the state court in such a case: *Id.*

The federal courts have an independent jurisdiction in the administration of state laws in cases between citizens of different states, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws: *Id.*

The federal courts will follow the rules of property and action which have been established by the course of the decisions of the courts of the state, especially with regard to the law of real estate and the construction of state constitutions and statutes: but where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, though for the sake of harmony they will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt: *Id.*

Contract between Members as to Vote—Public Policy.—A contract between two stockholders in a corporation, by the terms of which one, in consideration of a sum of money paid to him by the other, agrees to

vote for a certain person as manager of the corporation, and also to vote to increase the salaries of the officers of the corporation, including that of the manager, is void as against public policy, unless it is assented to by all the stockholders of the corporation; and whether it is valid if so assented to, *quære? Woodruff* v. *Wentworth*, 133 Mass.

CRIMINAL LAW. See *Constitutional Law; Jury.*

Pleading.—Where a criminal statute uses disjunctive language in defining an offence, an indictment under it may be drawn in the conjunctive. Thus, a statute made it an offence to "sell or give away" intoxicating liquors under certain circumstances. An indictment charged that defendant did "sell and give away" such liquors: *Held*, that it was not bad for duplicity: *The State* v. *Pittman*, 76 Mo.

Defendant as a Witness.—If the defendant in a criminal case testifies in his own behalf, his relation to the case may be considered by the jury as affecting his credibility: *The State* v. *Sanders*, 76 Mo.

Practice—Conviction on one Count only.—While the court may, it is not bound to, receive a verdict which finds the defendant guilty on one count, without any finding as to the other counts; and, as a general rule, where such verdict is tendered, the court should require the jury to deliberate further, so as to be able to respond to each count: *Jackson* v. *The State*, 38 or 39 Ohio St.

Recognisance—Informality in.—The principal and sureties bound in a recognisance for the appearance of the principal before a court, are presumed to know when and where the term will commence, and if the obligation, in view of such presumed knowledge, appears with reasonable certainty, the recognisance will not be deemed invalid upon the ground that the language of the statute providing therefor has not been strictly followed: *Jedlicka* v. *The State*, 38 or 39 Ohio St.

Where a statute, in prescribing the terms and conditions of a recognisance, requires that the accused shall be bound to appear at the next term, a recognisance omitting the word next, but strictly pursuing the statute in all other respects, will not be deemed invalid for such omission: *Id.*

Self-Defence.—In all cases of self-defence, whether it be of life or limb, or of any threatened felony on the person of the accused, the law of justifiable homicide is, that it must be made to appear that it was absolutely necessary to kill the deceased in the opinion of the slayer, founded on good reason, in order to save his life or prevent a felony on his person; and also, either that the deceased was the assailant or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was stricken: *Heard* v. *State*, 65 or 66 Geo.

DAMAGES.

Breach of Contract to deliver Goods—Pleading.—In actions by vendee against vendor for breach of contract to deliver goods, the general rule is, that the measure of damages is the difference between the contract price and the market price at the time and place of delivery;

but where an article is purchased, not for the domestic market, but to be shipped abroad, and the fact was shown on the face of the written contract and was known to the vendor, and it was impossible for the vendee to discover the inferiority of the article (which had been fraudulently substituted by the employees of the vendor) until it had reached its ultimate destination, the true measure of damages is the difference between the market price of the article contracted for, at the date of its arrival, and the price afterwards realized upon a sale thereof, together with the necessary and proper costs and expenses incurred in making the sale: *Camden Consolidated Oil Co.* v. *Schlens*, 59 Md.

Where in an action by vendee against vendor for breach of contract to deliver goods, the damages claimed by the plaintiff are not in their nature special, but such as are the natural and proximate result of the breach, it is not necessary that they should be particularly stated in the declaration: *Id.*

In an action by vendee against vendor for breach of contract to deliver goods—the breach being a failure to deliver the kind and quality of article contracted for—it is immaterial as to the legal right of the plaintiff to recover, whether the breach was caused by accident or design. It is not the less a breach, because the failure to deliver the article purchased, proceeded from the fraudulent acts of the defendant's agents: *Id.*

DEBTOR AND CREDITOR. See *Trust.*

Gift by Husband to Wife.—A gift by husband to wife will not be held void because it embraces all the property of the grantor; at least, not unless it is shown to be more than a reasonable provision for her: *Wood* v. *Broadley*, 76 Mo.

Creditors under the Statute of 13th Elizabeth, ch. 5—Judgment Creditor in an Action of Trespass.—The Statute of 13th Elizabeth, ch. 5, is sufficiently comprehensive in its terms to embrace, and does embrace, not only creditors technically so, but "all others who have cause of action, or suit, or any penalty or forfeiture; and embraces actions of slander, trespass and other torts:" *Welde* v. *Scotten*, 59 Md.

The judgment creditor in an action of trespass, has a judgment for such a cause of action as justifies his attacking any conveyance of the defendant made pending the suit, as fraudulently made and executed against him, if he has cause so to suppose; and should not be prevented by injunction from putting himself into such position that he may have the question of the *bona fides* of the grantee's purchase tested in a court of law and before a jury, through an action of ejectment: *Id.*

Assignment for Creditors—Powers given to Assignee by the Deed—When void.—An Arkansas statute required the assignee to sell all the property assigned to him at public auction within one hundred and twenty days. An assignment conferred on the trustees power "to sell and dispose of all of said property for cash as he should deem advisable and right, and to this end use his own discretion, subject to the supervision of the creditors * * * and to conduct and transact all of the business as he may deem proper in the exercise of a sound dis-

cretion," &c. *Held*, that the deed in effect authorized the assignee to sell at private sale, and at such time and in such manner as he should deem advisable and right, contrary to the mandates of the statute, and was *void*, and that the goods assigned could be seized and sold under execution writs against the assignors: *Jaffray* v. *McGehee*, S. C. U. S., Oct. Term 1882.

Insolvency—Preference by Guardian to Ward.—A guardian, who had misappropriated money belonging to his ward, being insolvent, within six months before the filing of a petition in insolvency against him, and with a view to give a preference to his ward, deposited his own money in a savings bank in his name as guardian of the ward. *Held*, that his assignee in insolvency could maintain a bill in equity to recover the amount so deposited, although the ward was ignorant of the misappropriation and of the fact of the guardian's insolvency: *Bush* v. *Moore*, 133 Mass.

Deed.

Conveyance of Coal in Land.—The granting clause in a deed was as follows: "The first party has agreed to sell and does hereby give, grant, bargain, sell and convey" unto the second party, their heirs and assigns, "all the stone coal lying and being in, under and upon certain premises," in consideration of thirty cents per ton on all coal when mined, and the second party bound themselves to mine at least three thousand tons annually. It was also stipulated that the second party "shall have the right to abandon the contract at any time when they shall determine, in their judgment, that said coal, in quantity, quality and condition, is no longer minable with economy and profit." *Held*, 1st. All minable coal in place passed absolutely to the grantees. 2d. After such conveyance no interest in the minable coal remained in the grantor subject to be mortgaged as land. 3d. A mortgage upon the remaining interest of the grantor in the land, did not cover the purchase-money due or to become due from the purchasers of the coal: *Edwards* v. *McClurg*, 38 or 39 Ohio St.

Donatio Mortis Causa.

What does not Constitute—Chose in Action.—H. M. Chaney, during his last sickness, and in apprehension of death, endorsed a certificate of deposit which was payable to his order, as follows: "Pay to Martin Basket, of Henderson, Kentucky; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself. H. M. Chaney." Chaney then delivered the certificate to Basket, and died. *Held*, not to constitute a valid *donatio mortis causa: Basket* v. *Hassell*, S. C. U. S., Oct. Term 1882.

A delivery of a chose in action, in terms, which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift: *Id.*

Equity. See *Account.*

What insufficient to give Jurisdiction in.—An assignee of a chose in action, or any other *cestui que trust*, cannot, merely because his interest

is an equitable one, proceed in a court of equity for the recovery of his demand: *Guaranty and Indemnity Co.* v. *Water Co.*, S. C. U. S., Oct. Term 1882.

Certain bondholders, whose bonds with others were secured by a common mortgage given by a corporation, filed a bill to recover certain moneys alleged to be due on a contract made by the city of Memphis with the mortgagor, which contract was assigned in the mortgage as part of the security for the bonds. *Held*, that as the demand against the city was cognizable at law in the name of the mortgagor, and no special circumstances being shown for a resort to equity, the bill should be dismissed: *Id.*

When Defendant in a Judgment at Law may not enjoin Proceedings under it.—The refusal of the trial court to grant a new trial cannot be reviewed by a bill in equity to enjoin proceedings on the judgment; nor will such matter as should have been urged in favor of the new trial form good ground for such a bill: *Embry* v. *Palmer*, S. C. U. S., Oct. Term 1882.

Errors and Appeals.

Pleading of Facts occurring after Appeal and Operating as a Bar to the Suit.—The payee of two promissory notes, given in part execution of a single contract, brought separate actions thereon against the maker, who in each action interposed the same counterclaim for damages caused by the payee's alleged fraud in making the contract. In one of these actions, a demurrer to this counterclaim was sustained, and after final judgment on the note, and after error was pending in the appellate court to reverse the judgment on the ground that the court erred in disallowing the counterclaim, the defendant prosecuted his suit for damages thereon in the other action, and accepted an agreed amount as his damages arising on such counterclaim, which was credited on the note sued on in that action, and judgment was rendered for the plaintiff for the balance due on that note. These facts were by leave of the appellate court, brought into the record by answer, to which the plaintiff in error demurred. *Held*, 1st. That facts of this nature occurring since the final judgment sought to be reversed, which in law, operate as a release, waiver or bar of the errors assigned, may be pleaded in the appellate court, as a defence to a proceeding in error. 2d. That the foregoing facts are in legal effect, a withdrawal of the counterclaim, and the plaintiff in error having received in the other action the damages arising on the same, waives his right to reverse the judgment for error in disallowing the same claim for damages in the action pending in the appellate court: *Matthews* v. *Davis*, 38 or 39 Ohio St.

Estoppel. See *Corporation.*

Recitals in Deed.—A grantee is not estopped by a recital in his deed from showing the real consideration upon which it was executed. *Wood* v. *Broadley*, 76 Mo.

Execution. See *Attachment.*

Executors. See *Account; Surety.*

EVIDENCE. See *Criminal Law.*

FRAUD. See *Debtor and Creditor.*

FRAUDS, STATUTE OF.

Promise to pay Note in Consideration of Purchase at Sale of Security.—Defendant promised plaintiff that if he would attend a sale about to be made under a deed of trust given to secure the note of a third person, held by plaintiff, and would buy in the property for defendant, he would pay plaintiff the amount of the note. *Held*, that the promise was not within the Statute of Frauds, and did not need to be in writing: *Hale* v *Stuart*, 76 Mo.

Novation.—Where a debtor, his creditor and a third person, who owed the debtor, came together, and it was agreed that the third person should pay the creditor, who thereupon looked to him for payment, and the debtor was released, the third person became the debtor by substitution, and the contract was not within the Statute of Frauds: *Howell* v. *Field*, 65 or 66 Geo.

GUARDIAN AND WARD. See *Debtor and Creditor.*

HIGHWAY.

Abandonment.—The abandonment of a public highway by mere non user does not work a forfeiture of the right to its use. An existing public road cannot be discontinued without the order of the ordinary or county commissioners, where there are such commissioners, based upon application and notice and duly registered in the proper office: *Jones* v. *Williams*, 65 or 66 Geo.

HUSBAND AND WIFE. See *Debtor and Creditor; Trust.*

Use of Wife's Money to pay Debts—Equity of Wife against Creditors—Set-off of Moneys paid for Support of Wife.—A husband cannot use his wife's separate money to pay his own debts, and if his creditor knowingly receives her separate funds for her husband's debt, she can recover the amount so paid. If the fund has been invested in realty by the husband's creditor, the husband being insolvent, the land is subject to her claim, and she may enforce a lien thereon in a court of equity: *Maddox* v. *Oxford*, 65 or 66 Geo.

Where it was sought by the wife to recover from a creditor of her husband who had knowingly received her funds in payment of his debt, the amount so received with interest thereon and to subject land in which such funds had been invested by the creditor, it was a proper subject of equitable set-off against her claim, that the husband held a bond for titles from the creditor to the land in controversy, which was worth much more than the amount of the wife's fund invested therein, that the husband was insolvent and unable to support her and that she actually subsisted on the rents, issues and profits of the land: *Id.*

INJUNCTION. See *Constitutional Law; Nuisance.*

INSURANCE. See *Constitutional Law.*

INTEREST. See *National Bank; Usury.*

Agreement to compound—Consideration.—The maker of a note bearing simple interest being sued upon the note, agreed by a separate instrument in writing, in consideration of the dismissal of the suit, that interest thereafter to accrue upon the note if not paid when due, should bear interest. *Held*, that this agreement was founded upon a sufficient consideration and was valid. The fact that it was made after the note was executed and by a separate instrument, was immaterial: *Jasper County* v. *Tavis*, 76 Mo.

Open Account.—An open account does not begin to bear interest until payment has been demanded: *Richardson* v. *Laclede County*, 76 Mo.

JURY.

Irregularity in selecting a Grand Jury—Effect upon an Indictment found by it.—In the selection of a grand and petit jury for Baltimore county, under the provisions of the Act of 1870, ch. 220, one of the forty-eight names drawn for the general panel was that of a non-resident of the county. This name was not, however, among those which were drawn as grand jurors. *Held*, 1. That whatever weight the non-residence of the party might have had in determining his own qualification as a petit juror, it had no substantial bearing upon the qualifications or fitness of those actually constituting the grand jury. 2. That the statute was to be regarded mainly as directory in its multifarious provisions; and unless any irregularities incident to carrying out its directions in good faith, should be shown to materially violate it, or so affect the juries as to prejudice the rights of the citizen, these irregularities should not be treated as fatal. 3. That the irregularity in this instance was no ground for a plea in abatement to an indictment found by said grand jury: *State* v. *Glascow*, 59 Md.

Exemption—Disability.—The fact that one of the grand jury indicting a person, and one of the petit jury which tried and convicted him, were over the age of seventy years, does not form proper ground for a writ of error: *Green* v. *The State*, 59 Md.

A proper construction of the several provisions of our law on the subject of the qualifications of jurors, gives an exemption to persons over seventy, and does not create a disability: *Id.*

If by mistake an exempted person is drawn on the grand or petit jury, and he choose to waive his privilege, and give no information of his age or cause of excuse, and preferring to serve, does serve, this is no reason for anybody's complaining, nor is there any sound reason for disturbing the verdict, or arresting the judgment because of the presence of such person on the jury: *Id.*

A law must be accorded such construction as will most reasonably accomplish the legislative purpose: *Id.*

LIMITATIONS, STATUTE OF.

Adverse Possession.—Upon a plea of the Statute of Limitations, the only evidence given of possession during the first year of the statutory period was that defendant's grantor went once upon the land, set up two stakes at what he was told were corners, tried to ascertain the boundaries

and afterward paid the taxes for the year: *Held*, that this did not amount to possession, and the plea was not sustained: *Bradstreet* v. *Kinsella*, 76 Mo.

Mechanics' Lien.

Taking of Note for—Waiver.—Where a promissory note is given and received in payment of a mechanic's claim for materials furnished and work done in erecting a house under a contract with the owner, the lien of the mechanic is waived: *Crooks* v. *Door, Sash and Lumber Co.*, 38 or 39 Ohio St.

Municipal Corporation.

Power to Authorize the Erection of Railway Gates—Injury to Private Owner.—The city authorities have the power to establish such reasonable appliances in the public thoroughfares where railroads pass along, as will, by a temporary arrest of travel, protect the public from the danger of meeting passing trains: *Textor* v. *The Baltimore and Ohio Railroad Co.*, 59 Md.

Assuming that the device of a post and beam for a safety railway gate at a street crossing a railroad is an approved one, the planting of the necessary post and the temporary interruption thereby of travel near the crossing, during the period of danger, must be submitted to, notwithstanding, from the propinquity of a man's residence to the railroad track, it may work more interruption to him than to others: *Id.*

Negligence—Officers—Notice.—In an action against a municipal corporation for damages resulting from the breaking of a plank in a bridge in one of its streets, the ground of the action is either positive misfeasance on the part of the corporation, its officers or servants, or of others under its authority, in doing acts which caused the street to be out of repair, or else neglect by the corporation to put the street in repair, or remove obstructions therefrom, or remedy causes of danger occasioned by the wrongful acts of others. In the former case, no further notice to the corporation of the condition of the street is essential to its liability. In the latter case notice of the condition of the street, or what is equivalent to notice, is necessary: *Mayor, &c., of Brunswick* v. *Braxton*, 65 or 66 Ga.

National Bank.

Usury—Set off.—Interest received by a national bank upon a promissory note, greater than the rate allowed by the laws of the state where the note was made, in violation of the U. S. Rev. Stats., sect. 5197, cannot be set off, in an action by the bank upon the note, against the amount due thereon; but the bank is entitled to recover only the face of the note, without interest: *First National Bank of Peterborough* v. *Childs*, 133 Mass.

Negligence. See *Municipal Corporation.*

Nuisance.

Ringing of Bell—Injunction.—The ringing, at an early hour in the morning (for the purpose of arousing the keepers of boarding-houses

where operatives in a mill live, or for the purpose of arousing the operatives themselves), of a bell weighing two thousand pounds and set in an open tower forty feet from the ground, and so situated with respect to the residences of persons, owned and occupied by them before the erection of the bell, that they receive the full force of the sound, such persons being thereby deprived of sleep during hours usually devoted to repose, and personally annoyed and disturbed, and the quiet and comfort of their homes impaired, is a private nuisance to them; the owner of the mill may be restrained by injunction from ringing the bell for such purposes, the ringing not being shown to be necessary or reasonable; and evidence of a custom to ring the bells in other places for similar purposes is inadmissible: *Davis* v. *Sawyer*, 133 Mass.

PUBLIC POLICY. See *Corporation.*

RAILROAD. See *Constitutional Law.*

RES JUDICATA.

Judgment of Court of Last Resort.—The doctrine of *res judicata* applies as well to judgments of courts of last resort as to those of *nisi prius* courts. If the same subject-matter comes in question in a second action before a court of last resort, it is bound by its own former decision: *Choteau* v. *Gibson*, 76 Mo.

SALE. See *Damages.*

Warranty of Quality—Fertilizers.—A merchant always warrants that what he sells is reasonably suited to the use for which it is bought. Therefore in a suit on a note given for chemicals to be used as a fertilizer, the plea being failure of consideration, there was no error in charging "that if the jury believed from the evidence that the fertilizer for which the note was given was properly and skilfully applied by defendants, that the soil was suitable and the seasons favorable, and that the fertilizer failed to produce any result as to an increase in the crops, then the fertilizer was not reasonably suited to the purpose for which it was sold, and you should find for the defendants," the converse of the proposition being fully given: *Barry* v. *Usry*, 65 or 66 Ga.

STATUTE.

Repeal of Prior Law.—When an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest; *The Town of Red Rock* v. *Henry*, S. C. U. S., Oct. Term 1882.

SURETIES.

General Bond of Executor—Subsequent Misappropriation of Moneys included in Special Bond.—The sureties on a general bond given by an executor, who has also given a special bond with sureties to account for, and dispose of according to law, the proceeds of a sale, under a license of the probate court, of the real estate of his testator, remaining after payment of debts, legacies and charges of administration, are not

liable for the neglect of the executor to pay over to the residuary legatees entitled thereto the balance of the proceeds of such sale, although the executor charges himself in his general account with the whole of such balance: *Robinson* v. *Milland*, 133 Mass.

TAXATION. See *Constitutional Law.*

TRUST.

Validity.—A residuary clause in a will in these words: "At the decease of my wife Esther I give and bequeath all my estate, real and personal, for the preaching of the gospel of the blessed Son of God, as taught by the people known now as Disciples of Christ. The preaching to be well and faithfully done in Lorain county, in Birmingham, and at Berlin, in Erie county, Ohio, and I nominate and appoint John Cyrenius, Silas Wood and Samuel Steadman executors of this item of my last will and testament, and I request them to do the business without remuneration,"—creates a valid trust which will be enforced in a court of equity: *Sowers* v. *Cyrenius*, 38 or 39 Ohio. St.

Settlement in Fraud of Creditors—Married Woman—A person cannot settle his property in trust to pay the income to himself for life, with a provision that it shall not be alienated by anticipation, so as to prevent his creditors from reaching the income by a bill in equity, and this rule applies to a married woman settling her separate property after marriage, where she has by law the right to make contracts as if she were sole: *Pacific Nat. Bank* v. *Windram*, 133 Mass.

Provision against Seizure by Creditors.—A person having the entire right to dispose of property may settle it in trust in favor of another, with the provision that the income shall not be alienated by the beneficiary by anticipation, or be subject to be taken by his creditors in advance of its payment to him, although there is no cesser or limitation of the estate in such an event: *Broadway Nat. Bank* v. *Adams*, 133 Mass.

UNITED STATES COURTS. See *Corporation.*

USURY. See *National Bank.*

Nature of—When cannot be set up.—A usury statute avoided the interest only, and by a constitution subsequently adopted all usury laws were abolished. *Held*, that as to a contract made while the usury statute was in force the right of the defendant to interpose its provisions as a defence was taken away by the subsequent constitution, it being a privilege that belongs to the remedy, and forming no element in the rights that inhere in the contract: *Ewell* v. *Daggs*, S. C. U. S., Oct. Term 1882.

VENDOR AND VENDEE. See *Damages.*

Purchaser of Equitable Title—Equities between Vendor and Holder of Legal Title.—The purchaser of an equitable title to land takes it subject to all the equities between his vendor and the holder of the legal title as they exist at the time of his purchase. Thus, where a county sold swamp land on credit, and caused a certificate of purchase to be delivered to the purchaser specifying the terms of the sale, and

providing that on compliance with these terms the purchaser should be entitled to a deed, and by a subsequent contract these terms were altered, but no change was made in the certificate. *Held*, that a subsequent purchaser from the county's vendee was bound by the altered terms: *Jasper County* v. *Tavis*, 76 Mo.

WARRANTY. See *Sale.*

WILL. See *Trust.*

Construction of.—A testator, by his will, directed that all his property be sold. By one of the clauses of said will, he bequeathed to T. B. H., as guardian of his son Arthur, $1500 of the proceeds, to be expended in the education of his said son in such manner as the guardian might in his judgment think right and proper. The will contained among others the following clause: "I will and direct that the balance of said proceeds, after deducting said several sums hereinbefore named, if any, be divided equally between my brothers J. R. N. and D. B. N." *Held*, that a balance of said sum of $1500 remaining unexpended in the hands of the guardian on the arrival at age of the testator's son Arthur, did not pass under the will to the testator's brothers; nor did it belong, as undisposed of by the will, to the testator's next of kin; but belonged to the son, on his arrival at age: *Nyce* v. *Nyce*, 59 Md.

Foreign Probate as Evidence.—The probate of a will in another state is a judicial proceeding, to the record of which full faith and credit is to be given, when authenticated as required by the act of Congress; and it is not necessary to the admission of such will with the probate thereof in evidence that they shall have been recorded in the state when offered: *Bradstreet* v. *Kinsella*, 76 Mo.

WITNESS.

Privilege—Right to Refuse to Answer—Question as to Reason of Refusal.—Where a witness on cross-examination, being asked questions which, if answered affirmatively, would tend to degrade and disgrace him, avails himself of the privilege accorded him by the court, and declines to answer, he cannot rightly be asked, "why do you decline to answer these questions?" When he has declined to answer he has done all that the rule of law requires him to do: *Merluzzi* v. *Gleeson*, 59 Md.

LIST OF THE PRINCIPAL NEW LAW BOOKS.

ADDISON.—A Treatise on the Law of Contracts. By C. G. ADDISON. 8th ed., by H. SMITH. With American Notes, by B. V. ABBOTT. 2 vols. 8vo., pp. 1921. Boston: Soule & Bugbee.

ALEXANDER AND EASTON.—Report of the Proceedings in the Case of The United States *v.* Charles J. Guiteau, tried in the Supreme Court of the District of Columbia, holding a Criminal Term, and beginning November 14th